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No. 88-905

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

PAUL C. KOHLMAN, PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal government's decision to issue onshore oil and gas leases for certain national forest lands constituted a "recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), which requires the preparation of an environmental impact statement to accompany such a proposal.

2. Whether Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat, permits such consultation on an incremental basis provided that it is completed prior to any irreversible and irretrievable commitment of resources.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) 14

Cabinet Mountains Wilderness v. *Peterson*, 685 F.2d 678 (D.C. Cir. 1982) 13

Conner v. *Burford*, 848 F.2d 1441 (9th Cir. 1988), petition for cert. pending, No. 88-865 ..... 4, 6, 7, 11, 12, 14

North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 13, 15

Park County Resources Council v. *United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) 8, 9, 13

Secretary of the Interior v. *California*, 464 U.S. 312 (1984) 14

Sierra Club v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) .. 9

Village of False Pass v. *Clark*, 733 F.2d 605 (9th Cir. 1984) 14

Statutes:

Endangered Species Act of 1973, 16 U.S.C. *et seq.*:

§ 7, 16 U.S.C. 1536 (1982 & Supp. IV 1986) 2, 5, 10, 11, 14

§ 7(a)(2), 16 U.S.C. 1536(a)(2) 11, 12

§ 7(b)(3)(A), 16 U.S.C. 1536(b)(3)(A) 3, 11

§ 7(c)(1), 16 U.S.C. 1536(c)(1) 11

§ 7(d), 16 U.S.C. 1536(d) 12

Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 to 1330-258 ..... 3-4, 10

Statutes—Continued: Page

Mineral Leasing Act, 30 U.S.C. 181 *et seq.* 2
30 U.S.C. 226(b)-(c) 3
National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. 4332(2)(C) 2
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 14
Wilderness Act, 16 U.S.C. 1131 *et seq.* 9

Miscellaneous:

54 Fed. Reg. 3333 (Jan. 23, 1989) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 852 F.2d 1223. The opinion of the district court (Pet. App. A20-A41) is reported at 685 F. Supp. 1514.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1988. Justice O'Connor extended the time within which to file a petition for a writ of certiorari until November 29, 1988. The petition was filed on November 29, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, authorizes the Secretary of the Interior to issue oil and gas leases and other mineral leases for federal lands. The Secretary conducts this leasing program primarily through the Bureau of Land Management (BLM) of the Department of the Interior. Mineral leasing decisions regarding national forest lands have been made in consultation with the Department of Agriculture's Forest Service, which is generally responsible for management of the national forests. When mineral leasing on national forest lands has been proposed, BLM and the Forest Service have agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), which requires preparation of an environmental impact statement (EIS) for inclusion "in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment * * *."

BLM and the Forest Service have also agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action taken by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat.[1] If the Forest Service determines that a threatened or endangered species is likely to be adversely affected, the Secretary

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[1] The Secretary of the Interior, acting through the Fish and Wildlife Service, generally has jurisdiction over nonmarine species, while the Secretary of Commerce, acting through the National Marine Fisheries Service, has jurisdiction over marine species.

must prepare a written "biological opinion" detailing how the agency action will adversely affect the species or its critical habitat (see 16 U.S.C. 1536(b)(3)(A)).

Based on the results of the NEPA and ESA inquiries, the Forest Service has been recommending to BLM whether the leases should be issued and, if issued, what conditions they should contain to protect against environmental harm. BLM, however, has retained ultimate authority to decide for itself whether to issue a mineral lease.[2]

Prior to 1981, BLM had received sixteen applications for noncompetitive oil and gas leases for lands within Montana's Lewis and Clark National Forest in an area known as Deep Creek (Pet. App. A8).[3] The Forest Service accord-

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[2] Since the leases challenged in this case were issued, however, Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 to 1330-258 (emphasis added), which amends the Mineral Leasing Act to provide that "[t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture" and that:

> The Secretary of the Interior, *or for National Forest Lands, the Secretary of Agriculture,* shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities, within the lease area.

[3] There are two classes of federal onshore oil and gas leases: competitive and noncompetitive leases. Under the Mineral Leasing Act as it existed in 1981, lands within boundaries of "known geological structures of a producing oil or gas field" outside Alaska were leased by competitive bid, if at all, and all other lands were leased noncompetitively, if at all, to the first qualified applicant. See 30 U.S.C. 226(b)-(c). The Federal Onshore Oil and Gas Leasing Reform Act of

ingly prepared an "environmental assessment" (EA) regarding the potential environmental impacts of the proposed leasing on the forest. Based on its EA, the Forest Service recommended in favor of leasing and also concluded that an EIS need not be prepared prior to leasing because the leasing itself would have no significant environmental impact (*ibid.*).

The Forest Service rested its negative determination largely on its recommendation that the leases contain standard and special stipulations restricting the lessee's right to engage in certain kinds of activities without prior agency approval (Pet. App. A27). These stipulations would include, among others: (1) a No Surface Occupancy (NSO) stipulation, prohibiting lessees from occupying or using the surface of the leased land without further specific approval from BLM (*id.* at A8; see *Conner* v. *Burford*, 848 F.2d 1441, 1444, 1447-1448 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865); (2) a Surface Disturbance stipulation, prohibiting a lessee from undertaking a surface disturbing activity until after it has requested and received BLM's approval of the nature and location of the activity, and authorizing BLM to impose on the lessee "reasonable conditions on surface-disturbing activity," "not inconsistent with the purposes for which the lease is issued" (*ibid.*; see *Conner* v. *Burford*, 848 F.2d at 1444, 1449-1450); and (3) a Threatened and Endangered Species (T&E) stipulation, generally authorizing the federal government to preclude absolutely any activity likely to jeopardize a protected species (see Pet. App. A8; see *Conner* v. *Burford*, 848 F.2d at 1455). The EAs contemplated that NSO stipulations would be included only in leases for forest lands with distinctive surface resource

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1987, however, generally requires that federal lands be initially offered at a competitive lease sale.

values needing special protections. The Surface Disturbance stipulation and the T&E stipulation would be included in every lease (*ibid.*).

Pursuant to the ESA, the Forest Service also conducted a biological evaluation of the effects of the proposed oil and gas leasing on threatened and endangered species (Pet. App. A8, A37-A38). The Forest Service's evaluation concluded that because of lease stipulations, including the T&E stipulation, the issuance of the leases would itself have "no effect" on any of the four threatened or endangered species known to be in the national forest (*ibid.*). As required by Section 7 of the ESA, 16 U.S.C. 1536 (1982 & Supp. IV 1986), the Forest Service then formally consulted with the Department of the Interior's Fish and Wildlife Service, which issued a biological opinion that similarly concluded that the leases, as conditioned, would not themselves likely jeopardize the existence of any of the four species (Pet. App. A8, A38). The opinion also concluded that a biological opinion on matters beyond the effects of leasing itself was not appropriate at this initial stage because there was insufficient information regarding post-leasing activities (*ibid.*).

BLM subsequently issued 16 leases for which applications had been received and three simultaneous oil and gas leases by lottery (Pet. App. A8; see note 3, *supra*). The leases covered the entire 42,000 acres of Deep Creek (Pet. App. A8). All of the leases contain the Surface Disturbance stipulation and the T&E stipulation (*ibid.*). Seventy-five percent of the land leased was covered by NSO stipulations (*id.* at A28-A29).

2. Following unsuccessful administrative challenges to the issuance of the leases (Pet. App. A23-A24), respondents Bob Marshall Alliance and the Wilderness Society (collectively referred to as respondent Marshall Alliance) brought this lawsuit against the federal respondents and

several individual lessees, including petitioner Paul C. Kohlman, in the United States District Court for the District of Montana. Respondent Marshall Alliance alleged, inter alia, that the federal respondents had violated NEPA by issuing leases without first preparing an EIS and had violated the ESA by failing to prepare a biological opinion regarding all aspects of onshore oil and gas exploration, production, and development (Pet. App. A20, A24).

The district court granted summary judgment in favor of respondent Marshall Alliance (Pet. App. A20-A41). The court concluded that the federal respondents had violated NEPA by failing to prepare an EIS prior to issuing the leases (Pet. App. A24-A34). According to the court, "[l]ater site specific analysis and protective stipulations simply do not comply with NEPA's comprehensive mandate to make early informed decisions and research cumulative effects of major proposed actions" (Pet. App. A34). The court also upheld respondent Marshall Alliance's claim that the federal respondents had violated the ESA "by failing to gather species and habitat data sufficient to make an informed biological assessment of the effects of leasing the Deep Creek Area" (Pet. App. A37).

3. Relying on its recent decision in *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865, the court of appeals affirmed in part and reversed in part (Pet. App. A1-A19). The court held that the "sale of Deep Creek leases required preparation of an EIS unless the lease 'absolutely prohibits surface disturbance in the absence of specific governmental approval' " (*id.* at A11, quoting *Conner* v. *Burford*, 848 F.2d at 1447 n.15). The court accordingly "affirm[ed] the district court's holding that the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases, and reverse[d] the district court's judgment insofar as it requires preparation of an EIS for the sale of NSO leases" (Pet. App. A11). The court instructed the district court, on re-

mand, "to determine which of the Deep Creek leases are NSO leases—that is, leases in which 'the language of the stipulation, construed with the rest of the lease, absolutely prohibits surface disturbance in the absence of specific government approval' " (*id.* at A12, quoting *Conner* v. *Burford,* 836 F.2d at 1527 n.15).[4] Finally, the court of appeals also upheld the district court's ruling that the federal respondents had violated the ESA, which, the court of appeals concluded, "requires the [Fish and Wildlife Service] to prepare a biological opinion assessing the impact of the issuance of the * * * leases and of all post-leasing activities on threatened and endangered species" (Pet. App. A12-A13).

ARGUMENT

We agree with petitioner that the court of appeals erred by relying on its prior ruling in *Conner* v. *Burford,* 848 F.2d 1441 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865, which misstates the requirements of both NEPA and the ESA. Unlike petitioner, however, we do not believe that the court of appeals' decision in this case or in *Conner* v. *Burford* clearly conflicts with a decision of another court of appeals. In addition, the practical significance of the court's NEPA and ESA rulings remains uncertain and can be more accurately assessed after the relevant federal agencies have sought to comply with those rulings and the lower courts have evaluated their efforts. Because further review at this time would therefore be premature, the petition for a writ of certiorari should be denied.[5]

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[4] The federal government, unlike petitioner, did not challenge the district court's ruling to the extent that it applies to non-NSO leases of Deep Creek, because Deep Creek is a "roadless" area (Pet. App. A7). See also *Conner* v. *Burford,* 848 F.2d at 1445 n.11.

[5] For these same reasons, we recently filed a brief in opposition to the petition for a writ of certiorari in No. 88-865, which seeks relief

1. Contrary to petitioner's claim (Pet. 6-10), the court of appeals' NEPA ruling does not irreconcilably conflict with the Tenth Circuit's decision in *Park County Resources Council* v. *United States Department of Agriculture*, 817 F.2d 609 (1987). Although the court of appeals in this case concluded that an EIS was required, while the court in *Park County* concluded that an EIS was not required, the different results reflect the very different facts present in the cases and do not necessarily mean that the courts applied fundamentally different views of the requirements of NEPA.

Specifically, the court in *Park County* rejected the plaintiffs' argument in that case that the issuance of an oil and gas lease of national forest land "always constitutes a major federal action significantly affecting the quality of the human environment under NEPA" and then found, based on the record in that case, that the "plaintiffs failed to meet their burden" of establishing that the agency acted unreasonably in declining to prepare an EIS (817 F.2d at 620-622). The court did not rule that the issuance of onshore oil and gas leases of national forest lands never requires preparation of an EIS. Instead, as the court of appeals itself made clear (*id.* at 623), it was "merely hold[ing] that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry." [6]

Nor, conversely, do we read the Ninth Circuit's decision in this case as resting on the absolutist position that the issuance of an oil and gas lease for national forest lands

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from the court of appeals' judgment in *Conner*. We have provided a copy of that submission to the parties in this case.

[6] At the time of the court of appeals' decision in *Park County*, the lessee was reserving its right to seek approval to drill an additional well in the future, but the lessee had already abandoned its one drilling effort and had completed its reclamation work at that site (817 F.2d at 615). An EIS had also already been prepared prior to permitting any exploratory drilling at the site (*id.* at 613, 622).

always requires an EIS. The court's ruling instead rests on its evaluation of the record in the case, including the quality and quantity of land to be leased, and the court's determination that the plaintiffs had succeeded in establishing the unreasonableness of the federal agencies' failure to prepare an EIS in the particular circumstances. As the court of appeals noted, "Deep Creek offers spectacular scenery and recreational opportunities for fishers, hikers, and outdoors enthusiasts of all kinds. Perhaps most important, it is home to a large and unique wildlife population." Pet. App. A6. In addition, unlike any of the lands at issue in *Park County,*[7] all of the 42,000 acres covered by the leases are "roadless" areas that the Forest Service has designated as a "further planning area," the wilderness attributes of which should be preserved pending completion of a study of the lands for possible "wilderness" designation under the Wilderness Act, 16 U.S.C. 1131 *et seq.* See Pet. App. A7; *Sierra Club* v. *Peterson,* 717 F.2d 1409, 1410-1411 (D.C. Cir. 1983).[8]

Indeed, for this reason, the federal respondents, unlike petitioner, did not appeal the district court's ruling that the government's issuance of non-NSO leases required the preparation of an EIS. We instead determined that the roadless character of Deep Creek warranted further environmental analysis prior to the issuance of non-NSO leases. Hence, the only aspect of the district court's NEPA ruling before this Court that we challenged in the court of appeals—the lower court's determination that an EIS was

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[7] The plaintiffs in *Park County* were challenging only a single lease, encompassing approximately 10,000 acres, none of which had ever "been designated a wilderness, wilderness study, park, or other restricted-use area" (817 F.2d at 612-613 & n.1; see *id.* at 622).

[8] The court of appeals further noted that a Forest Service study had "awarded Deep Creek the highest possible wilderness rating" (Pet. App. A7).

required even with respect to areas covered by NSO leases (approximately 75 percent of the total area leased)—was correctly reversed by that court (see Pet. App. A10-A12).

Finally, further review is not warranted at this time because subsequent regulatory developments may also diminish the practical significance of the court of appeals' NEPA ruling. In light of the Federal Onshore Oil and Gas Reform Act of 1987 (see note 2, *supra*), the Secretary of Agriculture has recently published in the Federal Register proposed regulations that, if adopted, would require all oil and gas leases issued for National Forest Lands to stipulate that "[t]he Secretary of Agriculture retains the authority under this lease to preclude all operations on a leasehold where analyses of the environment indicate such action is appropriate" (54 Fed. Reg. 3333 (Jan. 23, 1989)). If finally adopted as proposed,[9] Agriculture's regulations would change the regulatory setting substantially from that addressed by the court of appeals here. Indeed, because all future leases of national forest lands under Agriculture's proposed rules would be, in effect, NSO leases, federal respondents would not be required under the court of appeals' reading of NEPA to prepare an EIS prior to the issuance of any leases issued under that proposed regulatory scheme (see Pet. App. A10-A12).

2. We agree with petitioner that the court of appeals misconstrued Section 7 of the ESA, which requires that every federal agency, in consultation with the Secretary of the Interior, ensure that its actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their critical habitat (see 16 U.S.C. 1536 (1982 & Supp. IV 1986)). Con-

[9] Of course, the proposed rules are subject to public comment and further internal governmental review that may prompt their substantive modification prior to the promulgation of any final rules.

trary to the court of appeals' ruling (Pet. App. A12-A13), which simply relied on its prior decision in *Conner* v. *Burford,* 848 F.2d at 1451-1458, Section 7 does not require the preparation *at the leasing stage* of a biological opinion regarding all stages of oil and gas exploration, development, and production where, as in this case and *Conner,* the lease includes a T&E stipulation, expressly empowering the federal lessor to prevent any future activities likely to harm threatened or endangered species.[10]

Under Section 7, an agency proposing to take an action must inquire of the Secretary whether any threatened or endangered species "may be present in the area of the proposed action" (see 16 U.S.C. 1536(c)(1)). If the Secretary responds that one or more such species may be present, then the agency must prepare a "biological assessment" to determine whether any such species is "likely to be affected" by the action (*ibid.*). Finally, if, as in this case, the agency determines that such an effect is likely, it must formally consult with the Secretary, who must prepare a written biological opinion "detailing how the agency action affects the species or its critical habitat" (16 U.S.C. 1536(b)(3)(A)). Whenever the Secretary finds "jeopardy or adverse modification [of habitat]," the Act requires the Secretary to "suggest those reasonable and prudent alternatives" that he believes the federal agency can take in implementing the agency action without violating subsection (a)(2)'s prohibition on action "likely to jeopardize the continued existence of any endangered species or threatened

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[10] Contrary to respondent Marshall Alliance's intimation (Br. in Opp. 5-9), the Fish and Wildlife Service did not conclude that the Forest Service had failed to comply with ESA Section 7. The Fish and Wildlife Service instead agreed with the Forest Service that, because of the T&E stipulation, further analysis of the possible impacts of oil and gas exploration, development, and production could lawfully be postponed.

species or result in the destruction or adverse modification of [critical] habitat of such species" (16 U.S.C. 1536(a)(2)).

Section 7 bars, however, only two types of action: (1) agency actions that are "likely to jeopardize the continued existence" of threatened and endangered species or that would be likely to destroy or adversely modify their critical habitat (16 U.S.C. 1536(a)(2)); and (2) following initiation of consultation, "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]" (16 U.S.C. 1536(d)).[11] Because of the T&E stipulation, neither of these forbidden agency practices is implicated by the issuance of a lease in the absence of a biological opinion that discusses all aspects of oil and gas development. The T&E stipulation, in effect, limits the scope of the "agency action" that is subject to Section 7's consultation requirement at the leasing stage.[12]

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[11] Indeed, by negative implication, Section 7(d)'s command that federal agencies may not make "irreversible or irretrievable commitments" of resources pending completion of consultation directly supports the lawfulness of the limited action taken by the agency in this case. The court of appeals' only response in *Conner* to Section 7(d)—that it merely "clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process" and "is not an independent authorization for 'incremental-step' consultation" (see *Conner* v. *Burford*, 848 F.2d at 1455 n.34)—is unpersuasive. Section 7(d) would be mere surplusage under the court of appeals' view. In our view, the better reading of the provision, which gives meaning to Section 7(d), is that prior to completion of consultation agencies have discretion to take some action not involving "irreversible or irretrievable commitments of resources."

[12] The T&E stipulations provide (*Conner* v. *Burford*, 848 F.2d at 1455) (footnote omitted)):

> The Federal surface management agency is responsible for

We nonetheless do not join petitioner in suggesting this Court's review at this time of the ESA issue. The decision of the court of appeals does not squarely conflict with a decision of another court of appeals and the practical importance of the ESA ruling, which is presently uncertain, can be more accurately assessed after the federal respondents in this case have made an effort to comply in good faith with the court of appeals' ruling. Accordingly, this Court's attention is not now required.

Contrary to petitioner's claim (Pet. 11), the court of appeals' ESA ruling in this case does not clearly conflict with either the Tenth Circuit's ruling in *Park County* or the District of Columbia Circuit decisions in *North Slope Borough* v. *Andrus*, 642 F.2d 589 (1980), and *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678 (1982). In *Park County*, the Tenth Circuit did not even reach the ESA issue, apparently because it concluded that the plaintiffs' ESA challenge to the Forest Service's approval of an application for a permit to drill was moot because drilling had been abandoned by the time of the court's consideration of the issue (see 817 F.2d at 613, 614-615). Although the District of Columbia Circuit did reach the ESA issue in both *North Slope Borough* and *Cabinet Mountains Wilderness*, neither of those cases involved onshore leases issued under the Mineral Leasing Act. *Cabinet Mountains Wilderness* involved a plan of operations for exploratory drilling upon unpatented mining claims located under the

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assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be a violation of the [ESA] by detrimentally affecting endangered or threatened species or their habitats.

General Mining Laws (see 685 F.2d at 679; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)). *North Slope Borough* involved offshore leases under the multiple-stage leasing process mandated by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* (see *Secretary of the Interior* v. *California,* 464 U.S. 312 (1984)), which the court of appeals in *Conner* reasoned had "mitigated the ESA requirement that the biological opinion address all phases of the mineral leasing project" (848 F.2d at 1456).[13] Although, like the dissent in *Conner* (848 F.2d at 1462-1464 (Wallace, J., dissenting) and unlike the court below, we do not believe that these differences in statutory schemes should lead to a difference in the scope of the Secretary's consultation obligations under ESA Section 7 at the leasing stage, we cannot claim that a circuit conflict presently exists on that question—which is the precise question presented here.

Finally, the importance of the ESA issue, like that of the NEPA issue, is not yet certain. The court of appeals held that the Fish & Wildlife Service must "prepare a biological opinion assessing the impact of the issuance of the Deep Creek leases and of all post-leasing activities on threatened and endangered species" (Pet. App. A13). Because much of the discussion in a comprehensive biological opinion of such scope completed at the leasing stage will necessarily be somewhat speculative, the significance of the court's ruling can be ascertained only after the federal respondents have completed their efforts to prepare such an opinion and the lower courts have had an opportunity to pass upon its adequacy. Should the court of appeals' resolution of the ESA issue ultimately prove to have the unreason-

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[13] In *Conner*, the court of appeals similarly distinguished its own earlier decision in *Village of False Pass* v. *Clark*, 733 F.2d 605 (1984), which also involved OCSLA leasing (see 848 F.2d 1456-1457).

able effect of "telescoping * * * any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle" (*North Slope Borough*, 642 F.2d at 609), this Court's review may ultimately be warranted. Because, however, the court of appeals' ruling remains susceptible to more reasoned implementation, further review is not currently required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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